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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Implementation of Sections 3(n) and 332)
of the Communications Act)

Regulatory Treatment of Mobile Services)

GN Docket No. 93-252

To: The Commission

REPLY COMMENTS

T&K Communications Systems, Inc. (T&K) hereby submits reply comments in the above captioned rule making proceeding. T&K operates analog SMR facilities within the State of New York and has been in the radio two-way business for many years. Its interest and expertise regarding the subject matter of this proceeding are a matter of record and history. Accordingly, T&K offers the Commission its perspective on certain matters of concern.

Nextel's Comments and Proposals Should Be Rejected

T&K takes issue with the proposals put forth by Nextel Communications, Inc. (Nextel) in its comments which seek to place non-ESMR operators at the mercy of ESMR operators. Were an unfair advantage not already enjoyed by Nextel in the market, Nextel's proposals might be more palatable. However, as the Commission is fully aware, Nextel has already been the recipient of important advantages in the provision of SMR services. Further advantages to assist Nextel in advancing its machinations are neither necessary nor justified.

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Unshackled by loading requirements and construction deadlines, Nextel already has thousands of frequencies consolidated under its banner throughout the United States. Of those which have been obtained via application, the Commission would find a low percentage which have actually been constructed, despite the three-year period since grant of Nextel's waiver. It appears, moreover, that Nextel has been far more concerned with public offerings of stock than offerings of radio service to the public.

T&K's criticism arises out of Nextel's comments which reveal that it is providing ESMR service to only 5,000 subscribers. This is a mere jot of the total number of SMR subscribers throughout the United States and certainly cannot be viewed as a success story. It is certainly not a "mandate for change" nor a reason to disrupt a well-established industry.

It further appears to T&K that Nextel's comments suggest that it either has no intention or no ability to provide service to the public with its huge spectrum reserves. In accord with the Commission's Rules and to better serve the public interest, it would be appropriate for the Commission to request that Nextel identify which spectrum it intends to ignore in the construction of its systems and turn back that spectrum for use by other operators. This house cleaning would free up dozens of channels in markets where existing operators have been precluded from continued, logical growth as a direct result of Nextel's efforts to warehouse spectrum for its speculative uses.

Throughout its comments, Nextel repeatedly reminded the Commission how much money was invested in Nextel's ESMR scheme. Yet, Nextel offered not one smidgen of proof that, given the additional spectrum requested, Nextel's system would work as advertised. In light of the fact that Nextel's system obviously does not work as advertised to the Commission the first time around, if the Commission decides to accede to Nextel's request, it should require, no, demand, absolute, uncontrovertible proof that, this time, Nextel's system will work as promised.

T&K Demands Its *Ashbacker* Rights

T&K is an applicant before the Commission for additional SMR spectrum, including spectrum which Nextel would earmark for only ESMR use. T&K's application was submitted with the reasonable expectation that the frequencies available for grant would include all of the 280 SMR-trunked channels now available in accord with the Commission's Rules. Nextel's proposal would severely jeopardize the value of T&K's pending application and would reduce its opportunity for success, as opposed to other applicants who have applied or might apply for the same frequencies for operation of an ESMR system.

T&K is certain that the Commission is aware of the court's decision in Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1945), wherein the court stated that the Commission could not adversely affect the rights of one applicant versus another when both had filed for operation on spectrum to be granted for exclusive

operation. Prior to any entertainment of Nextel's radical proposal, the Commission must first determine whether any applicant might be so adversely affected and whether the Commission can fulfill its obligations under Ashbacker while meeting Nextel's proposed changes. T&K strongly doubts that the Commission will be able to successfully dodge the constraints of Ashbacker if it chooses to favor Nextel's position.

The effects of Ashbacker call into severe question whether Nextel's proposal might be legally permissible. Therefore, the Commission should summarily reject Nextel's proposal and hold Nextel to the original terms of its authority. Any additional reshuffling of rights, duties and responsibilities among ESMR operators, analog SMR operators, applicants, public safety entities, wait list applicants, and existing operators is certain to be a legal morass for which Nextel has provided little, if any, guidance.

Nextel's Eligibility

As the Commission is aware, Nextel's eligibility to remain (or become) a CMRS has been called into serious question by an opposition to Nextel's request for waiver of the Commission's foreign ownership rules. Nextel did not comment on this potential problem. The outcome of that proceeding is extremely relevant as to whether Nextel can properly request parity with other, dissimilar CMRS operators. Nextel's comments presumed that the foreign ownership question has already been concluded in its favor. To the best of T&K's knowledge, the Commission has neither investigated the allegations of violations of the Communications Act of 1934, as amended (including the recent

Budget Act) nor arrived at any final decision on Nextel's request for waiver. Accordingly, one may admire Nextel's confidence expressed in requesting parity to that which it assumes it is entitled. Or one may question the prudence of Nextel's premature request in light of this continuing question.

Likewise, Nextel did not comment on the investigation being performed by the U.S. Department of Justice regarding Nextel's operations in the market. T&K has been informed that the staff of the U.S. Justice Department has undertaken an investigation to determine whether Nextel's bold business plans have violated the antitrust laws. Again Nextel appears confident that the investigation will result in a positive outcome. Regardless, the Commission ought not deem it proper, reasonable or prudent to join in Nextel's cavalier approach to its position.

Finally, additional questions are beginning to swirl in the marketplace regarding whether Nextel's earlier claims of operational success with its Los Angeles system will result in any legal action by stockholders. It appears by its most recent comments that stock sales which occurred based on claims of a successful construction of an ESMR system in Los Angeles might require some future adjustment to offset any unmet claims or thwarted expectations. T&K lacks personal knowledge of this possibility since it holds no Nextel stock, however, the Commission would be justified in reviewing Nextel's reports to its shareholders to determine whether its claims therein are inconsistent with the comments now before the Commission. The Commission has a duty to assure that

its processes are not being used to protect Nextel from liability. The Commission's duty is solely to the public and its need for additional telecommunications services, rather than solely to that relatively minuscule portion of the public which invested in Nextel stock.¹

Nothing To Be Gained

From the Commission's perspective, there is little if anything to be gained by grant of Nextel's proposal.² The public which Nextel would serve is already receiving service from an increasing group of competitors, including IMTS, SMR, community repeaters, conventional services, paging companies, mobile data concerns, mobile satellite services, and more. Although Nextel would have the Commission believe that its service is vital to the marketplace, the Commission surely recognizes that nothing produced by Nextel is inherently unique or necessary. When one further considers the technological advances to be produced in the near future by the advent of PCS, Nextel's relative position and importance shrinks even further.

A direct result of the Commission's acceptance of Nextel's scheme would be the exaltation of a floundering SMR carrier to the position of PCS operator, thereby creating

¹ It is incumbent on the Commission to explore and investigate whether the intent of Nextel's proposal is not to serve the public interest, but rather to provide Nextel with an answer to any claims forwarded by disgruntled shareholders arising out of previous puffery.

² Indeed, when one considers that the task to make all of Nextel's wondrous plans come to fruition would fall squarely on the Commission and its already overburdened staff, one realizes that there is all too much to lose.

even greater inequalities in the market than those presently enjoyed by Nextel under its present authority, as compared to other SMR operators. What will also be suffered is the enormous cost to the Commission to process the hundreds of changes in licenses throughout the United States. Such changes will be neither as easily nor smoothly performed as is suggested in Nextel's comments. The Commission will be required to examine each such request to determine the overall effect on co-channel users within the area of exchange. In sum, it will be a time consuming, costly process for an already severely overburdened Commission staff.

Nor will analog SMR operators benefit by such changes. The Commission has already provided them, like Nextel, with protection in accord with the Commission's Rules to allow analog operators continued quiet enjoyment of their businesses. Nextel's proposal would disturb that quiet enjoyment and would provide no concurrent benefit to those licensees. Instead, the entire exercise would be performed for the sole and exclusive benefit of Nextel and other ESMR operators.

Even a cursory examination of the equities involved demonstrate that Nextel's proposal must fail. The public, which is better represented by the millions of persons receiving traditional SMR service than the few thousand claimed to be receiving service from Nextel, would suffer by down times, equipment recalls, forced obsolescence of existing units which cannot be converted, and loss of service. Nextel's proposals do nothing to compensate this segment of the public. Instead, Nextel appears to place that

burden squarely on the shoulders of analog SMR operators, without compensation or benefit.

Although T&K agrees with Nextel that no licensee is entitled to claim a proprietary interest in any particular frequency, T&K believes that Nextel has an extreme burden in proving that its scheme has sufficient value to the public interest to demand such radical upheaval of the present SMR licensing. It is T&K's opinion that this burden has not been met by Nextel's comments and that such a burden cannot be met by any continued touting of Nextel's as yet undeveloped services.

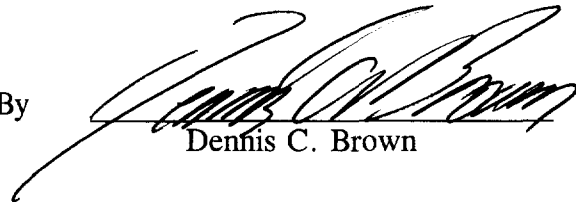
Conclusion

T&K respectfully requests that the Commission reject summarily Nextel's proposals regarding frequency reallocation for the exclusive benefit of ESMR operators.

The disruption and injury to be felt throughout the industry cannot be justified.

Respectfully submitted,
T&K COMMUNICATIONS
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By

A handwritten signature in black ink, appearing to read "Dennis C. Brown", is written over a horizontal line.

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Dated: July 11, 1994

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